

STATE OF MICHIGAN
IN THE SUPREME COURT

JEANNETTE GORDON,
Plaintiff-Appellant,

vs

HENRY FORD HEALTH SYSTEM,
Self-insured,
Defendant-Appellee.

Supreme Court:

Court of Appeals:
244596 *Cya 11/18/03*

Lower Court: WCAC
Docket No: 010173

NOTICE OF HEARING

PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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MICHIGAN SUPREME COURT

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NOTICE OF HEARING

TO: Thomas Fleury - Attorney for Defendant

PLEASE TAKE NOTE that the attached application for leave to appeal shall be brought on for hearing before the Michigan Supreme Court on Tuesday, January 20, 2004, or as soon thereafter as the Court may hear it.

Respectfully submitted,



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Dated: December 29, 2003

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STATEMENT OF BASIS OF JURISDICTION

This Court's jurisdiction in this matter is drawn from MCL 418.861a(14) and MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I

HAS THE WCAC CONDUCTED AN IMPERMISSIBLE DE NOVO REVIEW, SUBSTITUTING ITS FINDINGS OF FACT FOR THOSE OF THE MAGISTRATE AND JUSTIFYING IT BY ERRONEOUSLY CHARACTERIZING ITS EFFORTS AS LEGAL RATHER THAN FACTUAL?

Plaintiff-Appellant answers "YES."
The WCAC answered "NO."
The COA answered "NO."

II

EVEN IF IT CORRECTLY HELD THAT ANY OF PLAINTIFF'S BUSINESS INCOME COULD BE OFFSET AGAINST PLAINTIFF'S WORKERS' COMPENSATION BENEFITS, DID THE WCAC ERR IN NOT LIMITING THAT OFFSET TO THAT PORTION OF THE INCOME ATTRIBUTABLE TO PLAINTIFF'S OWN EFFORTS, AS OPPOSED TO A RETURN ON HER INVESTMENT?

Plaintiff-Appellant answers "YES."
The WCAC answered "NO."
The COA answered "NO."

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Plaintiff seeks leave to appeal from the November 18, 2003 order of the Court of Appeals, towards the end of the reversal of that opinion and either the reinstatement of the magistrate's opinion or the remand of this matter for a hearing based upon the appropriate factual review standard.

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Plaintiff-Appellant,

vs

HENRY FORD HEALTH SYSTEM,
Self-insured,

Defendant-Appellee.

Supreme Court:

Court of Appeals:
244596

Lower Court: WCAC
Docket No: 010173

PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

NOW COMES Plaintiff-Appellant JEANNETTE GORDON, by and through her attorneys, and respectfully requests that this Honorable Supreme Court grant her application for leave to appeal, stating as grounds the following:

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Numbers in parentheses shall refer to the trial transcript pages as follows:

"I"	September 6, 2000
"II"	September 19, 2000

"PX" shall refer to plaintiff's exhibits, while "DX" shall refer to defendant's exhibits.)

Plaintiff Jeannette Gordon previously received an open award of benefits in an order entered by former Magistrate Mary Susan Connolly, granting her benefits for work-related lower back and emotional/psychiatric disability.

The current proceedings were initiated upon the filing by defendant Henry Ford Health System of a petition to recoup, alleging that it should receive credit for plaintiff's

income as owner/operator of a group home, and be reimbursed for prior overpayments that income created. Plaintiff contends that this income is merely a return on investment, and not wages subject to credit.

Plaintiff testified at the hearing below that she was receiving both workers' compensation and social security disability benefits (I 17). She further testified that she was the owner/operator of two adult foster care homes for the mentally disabled Mt. Vernon Group Home (I 17-18,31-32). The homes were licensed in the name of plaintiff and Mt. Vernon Group Home, Incorporated, a corporation whose two shareholders were plaintiff and her daughter (I 18-20). However, plaintiff testified that she personally invested \$50,000-60,000 to get the business started, and spent more to keep things running thereafter (I 79).

Plaintiff testified that, if the State had any questions regarding the operation of the facilities, they would contact either her or the person that actually manages the homes (I 20). She had been contacted on occasion (I 23).

The facilities received their patients by being registered through the Oakland County Community Mental Health Department for licensed adult foster care (I 23). Again, the department would contact either plaintiff or the facility manager (I 24).

Plaintiff was responsible for hiring and firing staff (I 32-33). In that regard, she testified that she had employees that actually worked at and ran the group homes (I 71). This included an active, full-time manager at each home (I 71). In addition, the payroll was handled by a separate company which plaintiff contracted with to provide that service (I 30-31,80). As a result, she did not have to go to the homes at all, if she did not want to (I 74).

However, plaintiff testified that she went to the homes "[p]ractically every day or every other day" (I 27), although she later noted that there were weeks when she only went one time (I 91). She explained, "I go to talk to the residents to make sure they're being taken care of. The staff is doing what they want and if they have any objections or any gripes, they can talk to me about it" (I 27). Plaintiff sometimes went with staff members to get groceries (I 28-29), although, again, she had employees to do this (I 97).

At times, plaintiff would go with one of her employees to pick up a new patient (I 24-25). However, she employed drivers to handle this as well (I 32,76), and stated that she only went "when I feel like doing it..." (I 93).

Plaintiff received no ongoing payment for any services to the homes (I 29-30,65). She was never paid for any particular services (II 20). Instead, her income was any profit left over at the end of the year from the facility's receipts after the expenses and payroll were deducted (I 30,65). She received no salary (I 65,68). When she got her profit check each year, she then had to report it on her tax return and pay taxes accordingly (I 87-88).

Plaintiff's tax records reported a net profit for the corporation, an "S Corporation," of \$87,474 during 1998 (I 42; DX #1). In 1999, the corporation made a profit of \$60,321 (DX #2). Additionally reported was rental income from several rental properties plaintiff owned (I 47-48; DX #1 & 2). This included the two properties that housed the group homes, which plaintiff testified she owned and leased to the corporation (I 48-49).

Plaintiff filed an application with Ford Credit in April of 1998, listing a monthly "salary" that she explained actually represented the rents she received and her social security benefits (I 52,62; DX #3). The application listed Mt. Vernon Group Home as the employer (DX #3).

Further testimony came from Norvel Crawford, a private investigator who conducted surveillance on plaintiff on three days during June, 2000 (I 111,116). He produced videotapes of plaintiff picking up a patient on the first of the three days, and dropping one off on the second (I 113-114).

At the close of proofs, in a decision mailed from the Bureau of Workers' Disability Compensation on April 12, 2001, Magistrate Patrick J. MacLean denied defendant's petition to recoup, reasoning as follows:

"As such, I find that plaintiff's services were not rendered regarding real, palpable and substantial consideration, i.e., the payment of wages, but were rendered to protect her ownership investment in the business of the group homes. Accordingly, I find that plaintiff's income was investment income and not wages since this income was a return on her investment in owning the group homes and was no remuneration for her services.

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"As plaintiff's income from the group homes and rental properties constituted ownership or investment income and not wages, and did not establish a post-injury wage-earning capacity or affect the existence of plaintiff's established disability, MCL 418.371(1) does not apply to setoff said income from her weekly wage loss benefits. Accordingly, defendant's petition to recoup is denied and benefits are to be continued as originally ordered by Magistrate Connolly on June 23, 1992." Magistrate's opinion, at 6-7.¹

Defendant filed a timely appeal from this determination with the Workers' Compensation Appellate Commission ["WCAC"]. In an *en banc* order and opinion dated January 25, 2002, the WCAC reversed the magistrate's conclusion. It held that his factual

¹The above quotation omits language relative to plaintiff's ownership of rental properties. The WCAC affirmed the magistrate's finding that this was not creditable against plaintiff's workers' compensation benefits, and this finding is not being challenged on appeal.

findings were adequately supported by the record, but purported to challenge his legal conclusions:

"Although the magistrate's findings concerning plaintiff's role in her business are ordinary facts for which the record contains competent, material and substantial evidence, his conclusion concerning the legal impact of these facts is a jural relation subject to review by the Commission as a legal ruling. In the context of this case, we find the magistrate erred in his analysis of whether plaintiff's earnings can be credited against compensation due and owing." WCAC's Opinion, at 17 (footnote omitted).

It then went on to find that plaintiff was no passive investor, and held that her entire earnings from the business would serve as an offset to her workers' compensation entitlement:

"In the case before us, the facts found by the magistrate demonstrate that plaintiff is not merely a passive investor in her business. Although she is not able to perform the physical labor she did prior to her injury, the record shows an individual very active in the day-to-day operation of her business. The magistrate found plaintiff hires and fires the employees, establishes staff wages, and basically exercises control over the employees. In addition, on occasion, she was contacted by the Oakland County Community Mental Health Department with regard to new patients being admitted to the group homes.

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"As a result, it cannot be said that plaintiff's income from the group homes business reflects mere passive ownership. As a result, the employer is entitled to offset the net profit from plaintiff's business." WCAC's Opinion, at 18-19.

Believing that the WCAC overstepped the boundaries of its review powers and also committed reversible legal error, plaintiff sought leave to appeal to this Court of Appeals, which was denied on April 25, 2002. Plaintiff subsequently sought leave to appeal to this

Court, which issued an order on October 29, 2002, directing the Court of Appeals to consider the matter "as on leave granted."

Thereafter, in a split (2-1) opinion dated November 28, 2003, the Court of Appeals affirmed the WCAC's opinion, writing:

"The WCAC considered the definition of 'wage' and the characterization of 'wages' set forth by our Supreme Court in *Hoste*, and distinguished an employee's passive investment in a business enterprise from an employee's active participation in developing, running and maintaining a business for profit. It then concluded that because plaintiff's income reflects more than simple passive ownership of the group homes, defendant could offset the net profit from plaintiff's business from the compensation it owed to her. Plaintiff has not demonstrated that the WCAC's interpretation of subsection 371(1) is clearly incorrect. Thus, we defer to the WCAC's decision." Court of Appeals' Majority Opinion, at 5 (footnote omitted).

The dissenter would have permitted credit only for the value of plaintiff's service, the amount she found would constitute "wages":

"It does not follow, however, that all the employee's net profits, whether properly attributed to the employee's labor or to the employee's investment, should be treated as "wages" subject to setoff. The WCAC may properly determine the value of the employee's service to her company and treat that as wages. This amount will not necessarily equal the net profit from the business, which will likely include items related to the employee's investment in the company, and profit on other employees' labor. I would remand for a determination of the value of plaintiff's service to the corporation, i.e., what the corporation would pay a worker for such services, or, stated differently, what plaintiff would be paid for the services in the marketplace." Magistrate's Opinion, Dissenting Opinion, at 1.

Plaintiff now seeks leave to appeal to this Honorable Court.

ARGUMENT I

THE WCAC HAS CONDUCTED AN IMPERMISSIBLE DE NOVO REVIEW, SUBSTITUTING ITS FINDINGS OF FACT FOR THOSE OF THE MAGISTRATE AND JUSTIFYING IT BY ERRONEOUSLY CHARACTERIZING ITS EFFORTS AS LEGAL RATHER THAN FACTUAL.

Standard of Review. This Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691; 614 NW2d 607 (2000); DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000); Oxley v Dep't of Military Affairs, 460 Mich 536; 597 NW2d 89 (1999). In addition, the Court may reverse the WCAC if it misapprehends its administrative appellate role. Mudel, *supra*, at 709-710.

This standard permits further review and reversal in the instant matter. In that regard, it is plaintiff's position that the WCAC did misapprehend its administrative appellate role, by recasting factual findings as legal conclusions, and then reversing those factual findings without first finding that they were unsupported by the requisite evidence.

The magistrate held that the activities performed by plaintiff at her group homes did not produce wages that were "real, palpable, and substantial consideration" for those activities, instead finding that those activities were carried out to protect her ownership interest:

"As such, I find that plaintiff's services were not rendered regarding real, palpable and substantial consideration, i.e., the payment of wages, but were rendered to protect her ownership investment in the business of the group homes. Accordingly, I find that plaintiff's income was investment

income and not wages since this income was a return on her investment in owning the group homes and was no remuneration for her services." Magistrate's Opinion, at 6-7.

This makes a great deal of logical sense.

Plaintiff did not work a regular shift or perform a full day's work for the group homes. As owner, the government required that she act as contact person for certain matters, she hired and fired staff, and she occasionally assisted with such things as patient transport or grocery buying. However, she had a full staff, including full-time managers, to take care of all other matters, and even to do the things listed above if she chose not to participate.

In other words, this was not a real "job," as that word is commonly understood. Plaintiff likely could not walk into anyone else's group home and expect to be given a job hiring and firing employees, taking a few phone calls from the county, and doing whatever else she felt like doing. No home that already had a full-time manager or managers in place would require anyone to fill such a position. As a result, the magistrate was correct in finding that this was not a true job that paid wages, but that plaintiff's activities instead merely related to protecting her investment as the owner of the homes.

However, the WCAC reversed this conclusion. In so doing, it claimed that it was rendering legal analysis, but actually displaced the magistrate's factual analysis with its own. The WCAC simply felt that the nature of plaintiff's income was different than the magistrate believed.

In its decision below, the WCAC indicated that it agreed with the starting point of plaintiff's legal analysis:

"We agreed with the starting point of the magistrate's analysis. The monies an injured employee receives after injury must represent 'real, palpable and substantial consideration' in

order to count as credit against compensation benefits due and owing." WCAC's Opinion, at 17.

The WCAC further found that the magistrate's factual findings were adequately supported by competent, material, and substantial evidence on the whole record, as required by MCL 418.861a(3). However, it went on to indicate that it was actually his "jural relations" that it was finding were faulty:

"Although the magistrate's findings concerning plaintiff's role in her business are ordinary facts for which the record contains competent, material and substantial evidence, his conclusion concerning the legal impact of these facts is a jural relation subject to review by the Commission as a legal ruling. In the context of this case, we find the magistrate erred in his analysis of whether plaintiff's earnings can be credited against compensation due and owing." WCAC's Opinion, at 17 (footnote omitted).

In that regard, the WCAC stated:

"However, in concluding the earnings plaintiff received from her business were not substantial, the magistrate relied too heavily on the form of remuneration. In this application of the law the magistrate erred." WCAC's Opinion, at 17.

However, rather than relying upon the form of remuneration, as the WCAC claimed, the magistrate actually based his finding upon the nature of that remuneration:

"As such, I find that plaintiff's services were not rendered regarding real, palpable and substantial consideration, i.e., the payment of wages, but were rendered to protect her ownership investment in the business of the group homes. Accordingly, I find that plaintiff's income was investment income and not wages since this income was a return on her investment in owning the group homes and was no remuneration for her services." Magistrate's Opinion, at 6-7.

The WCAC simply re-cast the nature of this analysis, so that it could overturn factual findings it had previously held were supported by the requisite evidence.

That this is so is clear from the WCAC's analysis underlying its reversal, in which it conducted the very same factual inquiry as did the magistrate, but simply came to a different conclusion:

"In the case before us, the facts found by the magistrate demonstrate that plaintiff is not merely a passive investor in her business. Although she is not able to perform the physical labor she did prior to her injury, the record shows an individual very active in the day-to-day operation of her business. The magistrate found plaintiff hires and fires the employees, establishes staff wages, and basically exercises control over the employees. In addition, on occasion, she was contacted by the Oakland County Community Mental Health Department with regard to new patients being admitted to the group homes.

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"As a result, it cannot be said that plaintiff's income from the group homes business reflects mere passive ownership. As a result, the employer is entitled to offset the net profit from plaintiff's business." WCAC's Opinion, at 18-19.

This is not the application of any different legal test than that applied by the magistrate. Instead, it represents an undeniable usurpation of the factfinding process. While the WCAC may substitute its own findings for those of the magistrate, that is only so when it has first determined that those findings are not supported by competent, material, and substantial evidence. Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691, 699-700; 614 NW2d 607 (2000).

However, when this issue was raised before the Court of Appeals, it issued a somewhat contradictory ruling, writing:

"To the extent plaintiff claims that the WCAC erroneously overturned the magistrate's factual findings after stating that it found them to be supported by competent, material, and substantial evidence, we disagree. The record shows that the WCAC clearly considered the facts as found by the magistrate

and made a legal conclusion based on those facts. But contrary to the magistrate's holding, the WCAC determined that these facts indicated that plaintiff was more than a passive investor in her business and that her activities with respect to the group homes elevated her income from a simple return on an investment to compensation for work performed or services provided. The WCAC did not apply a de novo standard of review to the magistrate's factual findings, but properly reviewed them to determine if they were supported by the requisite evidentiary standard and made a legal conclusion based on those facts." Court of Appeals Majority Opinion, at 3-4 (footnote omitted).

As the Court of Appeals noted, the WCAC simply decided "that plaintiff was more than a passive investor in her business and that her activities with respect to the group homes elevated her income from a simple return on an investment to compensation for work performed or services provided." *Id.* This is the very essence of a factual inquiry. The nature of plaintiff's involvement in the business and the nature of the income she received therefrom she be considered a factual determination, not a legal one.

That being so, the WCAC should be found to have overstepped the boundaries of its appellate review. If it wished to find that the income plaintiff had was the result of more than a mere passive investment, it was obliged to first reverse the magistrate's finding to the contrary by undertaking a competent, material, and substantial evidence analysis. Only if it found that the requisite evidence did not exist to support the magistrate's finding could it substitute its own conclusion in that regard. Mudel, supra.

Leave to appeal should be granted in this matter, or, in the alternative, the decisions of the WCAC and Court of Appeals as to the nature of plaintiff's post-injury income should simply be vacated and this matter remanded for the conducting of an appropriate factual analysis pursuant to the controlling review standard.

ARGUMENT II

EVEN IF IT CORRECTLY HELD THAT ANY OF PLAINTIFF'S BUSINESS INCOME COULD BE OFFSET AGAINST PLAINTIFF'S WORKERS' COMPENSATION BENEFITS, THE WCAC ERRED IN NOT LIMITING THAT OFFSET TO THAT PORTION OF THE INCOME ATTRIBUTABLE TO PLAINTIFF'S OWN EFFORTS, AS OPPOSED TO A RETURN ON HER INVESTMENT.

Standard of Review. This Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); Mudel v Great Atlantic & Pacific Tea Co, 462 Mich 691; 614 NW2d 607 (2000); DiBenedetto v West Shore Hospital, 641 Mich 394; 605 NW2d 300 (2000); Oxley v Dep't of Military Affairs, 460 Mich 536; 597 NW2d 89 (1999). In addition, the Court reviews issues of statutory construction de novo. DiBenedetto, supra, at 402.

As noted in Argument I, plaintiff believes the WCAC overstepped the boundaries of its review powers in simply recharacterizing the nature of plaintiff's earnings despite contrary factual findings it held were supported by the requisite evidence. If this Court believes that the WCAC acted appropriately, it should at the least restrict the scope of the holding below to those portions of plaintiff's income that do not represent mere return on her investment.

The WCAC set forth the legal principle it purported to apply as follows:

"We believe the correct rule is that an employer may receive credit for the net earnings of an individual who is able to operate an independent business after injury without regard to whether those earnings are denominated wages or profits.

To refuse to permit credit in such a situation would enrich the employee at the employer's expense simply because the employee chose to operate her own business rather than return to service with another employer. We recognize that an employee who receives only income from passive investment in a business enterprise, without engaging in any substantial work in furtherance of the business enterprise, may not be charged with creditable earnings to offset compensation." WCAC's Opinion, at 18.

The WCAC was obviously trying to draw a distinction between money earned from the active labor of a claimant, and the amounts he or she may earn from investments not dependent upon such labor. If this is the line to be drawn, however, it was not properly drawn in this matter.

Once the WCAC found that some of plaintiff's incomes resulted from her active labor, it simply held that all of her income from the group home was subject to offset:

"In the case before us, the facts found by the magistrate demonstrate that plaintiff is not merely a passive investor in her business. Although she is not able to perform the physical labor she did prior to her injury, the record shows an individual very active in the day-to-day operation of her business. The magistrate found plaintiff hires and fires the employees, establishes staff wages, and basically exercises control over the employees. In addition, on occasion, she was contacted by the Oakland County Community Mental Health Department with regard to new patients being admitted to the group homes.

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"As a result, it cannot be said that plaintiff's income from the group homes business reflects mere passive ownership. As a result, the employer is entitled to offset the net profit from plaintiff's business." WCAC's Opinion, at 18-19.

This finding involves an insupportable leap of faith. The fact that some of plaintiff's income is derived from her active efforts does not mean that all such income is so derived.

Plaintiff has a substantial investment in the group home. Much, undoubtedly most, of the profit is derived not from her personal efforts, but instead from the fact that she provides the building in which the facility is located, as well as a full staff to operate it and offer services to its residents. The income resulting from all this activity is not the result of plaintiff's activities. Instead, it is the consequence of her investment in a business enterprise, the very line the WCAC purported to draw.

Put another way, if someone else was hired to take over plaintiff's duties, she obviously would be paid only the reasonable value of her services, not the net profit of the entire business. It is only that reasonable value that should be offset, a fact the dissenter below correctly noted:

"It does not follow, however, that all the employee's net profits, whether properly attributed to the employee's labor or to the employee's investment, should be treated as 'wages' subject to setoff. The WCAC may properly determine the value of the employee's service to her company and treat that as wages. This amount will not necessarily equal the net profit from the business, which will likely include items related to the employee's investment in the company, and profit on other employees' labor. I would remand for a determination of the value of plaintiff's service to the corporation, i.e., what the corporation would pay a worker for such services, or, stated differently, what plaintiff would be paid for the services in the marketplace." Magistrate's Opinion, Dissenting Opinion, at 1.

This is the only rational result.

The Ohio case cited to by the WCAC, State ex rel Richards v Industrial Comm'n of Ohio, 110 Ohio App 3d 109; 674 NE2d 667 (1996), requires no contrary result. In that case, the Court was concerned with reaching a result that did not penalize the self-employed when compared with the employed: "While this computation works well for claimants who are employed by another, it penalizes the claimant who is self-employed

because the pre- and postinjury scenarios are different.” Id., at 111. The same concern is presented by this case.

If plaintiff had taken a job with another group home, performing the duties she handled for her own homes, she certainly would not have been rewarded with the full net profit of the company. Her own labor’s contribution to the bottom line would not be that extensive. The same is true here. Plaintiff performs minor administrative functions, but has in place full-time managers and staff who conduct most of the day-to-day business of the homes. The fruits of their labor should be separated from that of plaintiff.

If any credit at all is appropriate, it should be limited to the reasonable value of the services she actually provided. Otherwise, the employer will realize a windfall merely because plaintiff chose to own her own business after her injury, rather than taking a job with another group home (if such a job could even be obtained). The law discourages such a windfall. See, e.g., Thick v Lapeer Metal Products, 419 Mich 342; 353 NW2d 464 (1984).

Additionally, in Richards, supra, the plaintiff’s net profits were a reasonable indication of the value of his services. He began a business selling and installing garage door openers, and the opinion of the Ohio Court of Appeals includes no suggestion that his earnings were the result of anything other than his own efforts. That is clearly not the case here.

Unfortunately, the Court of Appeals majority simply deferred to the WCAC’s findings, with no real analysis at all despite its de novo statutory construction powers:

“When interpreting the worker’s disability compensation act (WDCA), courts must take into consideration the fact that ‘the WDCA is a remedial statute that should be ‘liberally construed to grant rather than deny benefits.’” As a general rule, deference is given to the agency’s construction of

statutory provisions, providing that interpretation is not clearly incorrect.

“The WDCA exists to ‘compensate a claimant for lost earning capacity caused by a work-related injury, under a comprehensive scheme that balances the employer’s and the employee’s interests.’ Subsection 371(1) instructs, with regard to an employer’s responsibility to pay worker’s compensation benefits: ‘[t]he compensation payable, when added to the employee’s wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee’s average weekly earnings at the time of the injury.’ In *Powell v Casco Nelmor Corp*, our Supreme Court held that under subsection 371(1), an employer may set off a disabled employee’s wages or wage-earning capacity after the injury. Thus, defendant may deduct from the amount of compensation it must pay to plaintiff any wages earned by plaintiff after her disabling injury.” Court of Appeals Majority Opinion, at 4-5.

Plaintiff submits that the Court of Appeals essentially abdicated entirely its review of this issue, despite its de novo powers. It offered little analysis, and instead essentially deferred entirely to the WCAC.

Plaintiff submits that the idea of deference is contrary to the idea of a de novo review of questions of statutory construction, a conflict also acknowledged by another panel of the Court of Appeals in *S Abraham & Sons v Dep’t of Treasury*, ___ Mich App ___, ___ NW2d ___ (Docket No. 241154, rel’d December 11, 2003):

“Although we are cognizant of instances in which this Court has deferred to an agency’s construction of a statute, we question the continued viability of this precedent. We review questions of statutory interpretation de novo, *Schaub, supra*, which, by definition, precludes granting deference to a lower tribunal’s interpretation of a statute. See *Buchanan v City Council of Flint*, 231 Mich App 536, 542 n 3; 586 NW2d 573 (1998). Further, as our Supreme Court recently reiterated, ‘[a]n agency interpretation cannot overcome the plain meaning of a statute.’ *Koontz v Ameritech Services, Inc*, 466 Mich 304, 324; 645 NW2d 34 (2002), quoting *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 157 n 8; 596 NW2d 126 (1999). We also note that it is within the province of the courts, not

administrative agencies, to determine and apply the law.
Charles Reinhart Co v Winiemko, 444 Mich. 579, 591-592; 513
NW2d 773 (1994) (citations omitted)." Id., n 8.

At the least, the Court should have given this important question of first impression more consideration than it did, especially given the obvious logic of plaintiff's position.

If any of plaintiff's income is subject to offset, this matter should be remanded to determine the value of plaintiff's services, and to separate that amount from other sums representing a return on her investment as group home owner. Put another way, there should be a finding as to what activities would be deemed "wage-producing" and what their value might be, before any credit or offset could be computed.

Leave to appeal should be granted accordingly.

RELIEF

WHEREFORE Plaintiff-Appellant JEANNETTE GORDON respectfully requests that this Honorable Supreme Court grant her application for leave to appeal, and further grant her any other relief to which she may be entitled.

Respectfully submitted,



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